United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4054

To be argued by
MARY P. MAGUIRE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4054

VIOLA CHOW,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Viola Chow petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on February 13, 1975. That order denied Chow's motion to reopen her deportation proceedings so that the Board could reconsider its decision of August 2, 1974 which dismissed Chow's appeal from an order of an Immigration Judge denying Chow's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h).

This petition for review was filed on March 21, 1975 and pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3) Chow's deportation has been stayed.

ISSUES PRESENTED

1. Whether the Board of Immigration Appeals abused its discretion by declining to reopen the

deportation proceeding for reconsideration of its order dismissing petitioner's appeal from the denial of her application for withholding of deportation pursuant to Section 243(h) of the Act.

2. Whether the denial by the Board of petitioner's application for withholding of deportation was arbitrary and capricious or an abuse of discretion.

3. Whether petitioner was accorded due process in the deportation proceeding.

STATEMENT OF FACTS

Viola Chow is a 39 year old alien, a native of China and a citizen of the Republic of China (Taiwan). She first entered the United States in 1957 in diplomatic status and on June 19, 1961 her status was adjusted to that of a lawful permanent resident alien. On April 17, 1968 petitioner was convicted in the United States District Court for the Southern District of New York for unlawfully, wilfully and knowingly receiving, concealing,

selling and facilitating the transportation, concealment and sale of opium and conspiracy to do so, in violation of Title 21, United States Code, Sections 173 and 174 (T.).

As a result of that conviction deportation proceedings were instituted against Chow on September 3, 1969 by the issuance of an order to show cause and notice of hearing (T.). Chow was charged with being deportable under Section 241(a)(11) of the Act, 8 U.S.C. §1251(a)(11) by virtue of the conviction. At a deportation hearing held on November 13, 1969 Chow conceded her deportability (T. , p.) and requested that her deportation in the first instance be directed to Hong Kong (T. , p.). When she was informed that if Hong Kong would not accept her as a deportee, her deportation would be directed to the Republic of China (Taiwan), Chow claimed the benefits of Section 243(h) of the Act, 8 U.S.C. §1253(h), claiming that she would be subject to persecution were she deported to Formosa. On October 14, 1971 Chow was accorded a continued

hearing at which time she was to have submitted evidence or proof of her claim. In a decision dated November 8, 1971 the Immigration Judge found the petitioner deportable as charged, ordered that she be deported to Hong Kong or, if Hong Kong refused to accept her or failed to advise the Attorney General within three months of his original inquiry whether or not she would be accepted, that she be deported to the Republic of China (Taiwan), and denied her application for temporary withholding of deportation to the Republic of China under Section 243(h) of the Act.

Chow appealed the decision of the Board and, after reviewing the record and hearing oral argument, the Board remanded the matter to the Immigration Judge by an order and decision dated May 25, 1972 in order to afford Chow an opportunity to apply for withholding of deportation to the Republic of China and to support her claim under Section 243(h). Evidence adduced at the hearing established that her claim for withholding of deportation pursuant to Section 243(h) was based upon

two factors: (1) that she supports the United States in its changed policy with respect to commercial and foreign policy relations with the People's Republic of China; and (2) that she will be subject to criminal punishment, including the death penalty, in Taiwan because of her narcotics conviction in the United States. In a decision dated July 19, 1973 the Immigration Judge found that Chow had failed to meet her burden of establishing by any substantial, credible evidence that the particularized persecution contemplated under Section 243(h) would result upon her return to Formosa.

Petitioner again appealed the order of the Immigration Judge to the Board (T.) and by a decision and order dated August 2, 1974 the Board dismissed Chow's appeal. In so doing the Board held that, after consideration of all the evidence in the record petitioner had failed to show that she has a well-founded fear of persecution. The Board further held that petitioner's claim that deportation can constitute cruel and unusual punishment has been rejected by the courts on many occasions.

On August 19, 1974 petitioner filed a motion to reopen her deportation proceedings and for reconsideration of the decision and order of the Board of Immigration Appeals dated August 2, 1974. The motion sought reopening and reconsideration on three grounds: (1) that petitioner had been denied procedural due process because the Board had dismissed petitioner's appeal without providing petitioner an opportunity to present oral argument and to submit a brief; (2) that petitioner had been denied due process because her request to examine the Service records relating to one Lei Choun Hsu had not been honored; and (3) because the Service had directed the petitioner to surrender for deportation to Taiwan.

By order dated September 11, 1974 the Board granted oral argument on the motion to reopen and oral argument was heard on October 30, 1974. By decision and order dated February 13, 1975 the Board denied the motion to reopen and reconsider. The Board found that (1) the

suggestion that Chow had been denied due process to be "utterly groundless", and (2) the motion failed to set forth any new material or evidence which would warrant reopening and (3) the petitioner did not meet the clear requirements for reopening under the regulations.

This petition for review was filed on March 21, 1975 and Chow's deportation stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

RELEVANT STATUTES

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, 8 U.S.C. §1253 -

* * * * *

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATIONS

Title 8, Code of Federal Regulations [CFR] -

§3.2 Reopening or reconsideration

***Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing * * *

§3.8 Motion to reopen or motion to reconsider

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

§242.17 Ancillary matters, applications.

* * * * *

(c) Temporary withholding of deportation. The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first

instance be directed pursuant to Section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to Section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act*, has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing". Additionally, 8 C.F.R. 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material".

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that

*Section 103(a) of the Act, 8 U.S.C. §1103(a).

the evidence be heretofore uncbtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceedings. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence she offered in support of her motion.

B. Withholding of deportation under Section 243(h) of the Act.

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly

authorized delegate*. Muscardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967),

*The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967); Lena v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muscardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd, 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary

authority by denying the petitioner's application for withholding of deportation. Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

C. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts in this case it is evident that there has been no abuse of discretion. The Board amply supported its decision denying the petitioner's application under Section 243(h) with reasons which were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies, nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Board followed the well-established rule that withholding of deportation is warranted only where there is clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, supra.

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that she would be subject to

persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974). This the petitioner was unable to do. Her evidence, consisting solely of bare conclusory statements, without factual support which might demonstrate the reasonableness of her belief that she will be persecuted, is insufficient. Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972); Gena v. Immigration and Naturalization Service, 424 F.2d 227 (5th Cir. 1970).

The first basis of petitioner's claim seems to be the fact that she allegedly supports the United States policy of rapproachment with respect to the People's Republic of China. At the deportation hearing petitioner spoke in broad generalities about her political beliefs and only in response to leading questions put to her by her attorney. There is no evidence in the record to establish that petitioner's political views are known to the Taiwan Government. She first entered the United States as the wife of a Taiwanese diplomat. Her brothers apparently resided in Taiwan until recently without any

interference. The petitioner has apparently never been involved in politics and was not a member of any political party. These factors obviously do not form a sound basis on which to predicate a claim of persecution.

The second basis of petitioner's claim is apparently based upon her fear that she would be imprisoned upon her return to Taiwan in view of her narcotics conviction. While the Act does not precisely define the type of persecution which would make an alien eligible for the withholding of deportation, the courts have defined "persecution" as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in any way regarded as offensive". Kovacs v. Immigration and Naturalization Service, 407 F.2d 102, 107 (9th Cir. 1969).

The courts have consistently held that punishment for a traditional, non-political crime does not constitute persecution within the meaning of Section 243(h) of the Act. Kovacs v. Immigration and Naturalization

Service, supra; Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Kalatjis v. Rosenberg, 305 F.2d 249 (9th Cir. 1962); Blajiac v. Flagg, 304 F.2d 623 (7th Cir. 1962); Wang v. Pilliad, 285 F.2d 517 (7th Cir. 1960). Chow has not presented one scintilla of evidence to establish that the present government of Taiwan engages in the unwarranted persecution of persons based on political opinions, race or religious views which are in opposition to the views of the established government in Taiwan. Under the statute, punishment for a crime is not construed to be persecution unless it is established that the prosecution would in fact be for political offenses. Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968); Soric v. Immigration and Naturalization Service, 346 F.2d 360 (7th Cir. 1965), vacated and remanded, 382 U.S. 285 (1966).

A careful examination of the evidence before the Board establishes that it was abundantly clear that the record was completely barren of any facts or testimony, other than the alien's own expressions of fear, which would indicate a probability of persecution upon her return.

It is submitted that the petitioner did not meet her burden of proving that she would be singled out as an individual and persecuted upon her return to Taiwan and, accordingly, there was no abuse of discretion in denying her withholding of deportation.

D. Petitioner was accorded due process.

Petitioner Chow alleges that the Attorney General erred in denying her Section 243(h) claim without according her due process. A review of the record will establish that petitioner's contentions are utterly without merit. When it became apparent at the first deportation hearing in 1968 that petitioner might have a claim pursuant to Section 243(h) the hearing was adjourned and not continued for a period of almost two years. Petitioner has been given numerous opportunities to submit evidence in support of the claim. This she has been unable to do. Her attorney has had two opportunities to present her case to the Board and to file briefs in support of her position. He has been given access to the Service

file of another alien whose relation to the petitioner has never been made clear. Even after examining that file the petitioner's attorney was unable to demonstrate the relationship between the petitioner's deportation to Taiwan and the file of the other alien.

The deportable alien who seeks the benefits of Section 243(h) of the Act is not without rights. He has a right to have his application considered in accordance with the pertinent regulations which have been promulgated by the Attorney General. Blazina v. Bouchard, 286 F.2d 501 (3d Cir. 1961). Moreover, the deportable alien's application may not be denied capriciously. Ibid.

A review of the administrative record clearly shows that Chow was accorded procedural due process and that the applicable regulations were fully complied with in making a determination on Chow's application. 8 C.F.R. §242.17 provides that an alien's application for withholding of deportation "shall consist of the alien's statement setting forth the reasons in support of his

request". The regulation further provides that the alien "shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available".

The original claim submitted by Chow does not make out a prima facie showing of persecution. The petitioner had ample time to substantiate her claim but took no steps to do so. Where, as here, the alien has been accorded procedural due process and her application has received fair consideration, the Court may not substitute its judgment for that of the Attorney General or his representatives. United States ex rel. Ciannamea v. Neelly, 202 F.2d 289 (7th Cir. 1953).

Chow's application pursuant to Section 243(h) was certainly given careful consideration by the Immigration Judge and the Board; the opinions of both the Immigration Judge and the Board fully rebut Chow's contention that the application was denied in a capricious or arbitrary manner. Chow was accorded her due process

rights pursuant to the regulations, but nevertheless she failed to establish that she is statutorily eligible for the relief which she seeks.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-1025

State of New York)
County of New York) ss

Pauline p. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

6th day of February, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Irving E. Field, Esq.,
310 Madison Ave.
NY NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

6th day of February, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977